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PETITION FOR CERTIORARI

No. 832

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1966

JAMAICA TIME PETROLEUM, INC.,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

Respondent.

ON PETITION
FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT

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WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE
UNITED STATES FOR THE TENTH CIRCUIT

JAMAICA TIME PETROLEUM, INC., your Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on September 7, 1966.

OPINIONS BELOW

There was no formal opinion of the United States District Court for the District of Kansas. The opinion of the Court below in this case (Appendix "A" infra, p. A-1) is reported at 366 F. 2d 156.

JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit, was entered on September 7, 1966. The jurisdiction of this Court is invoked under the provisions of 28 U. S. Code, Subsection 1254(1).

QUESTIONS PRESENTED

1. Did Petitioner receive, and could it have received, a fair trial, consistent with modern concepts of due process, in an action for breach of a fire insurance contract affirmatively defended on the grounds of (1) fraud in the inducement and (2) arson, where the chief and most vital witness for the defense admitted the arson and was an habitual criminal who was paid excessive ($1000.00) witness fees to so testify?

2. Was such a witness competent to testify?

3. After such evidence was given and received, was not Petitioner entitled to a jury instruction, "that the law does not authorize the payment to law witnesses in excess of ordinary witness fees, and if a witness has been so paid, that fact may be considered in determining the weight and credit to be given to his testimony"?

4. Did the Petitioner receive a fair trial consistent with modern concepts of due process in light of the pretrial newspaper publicity given to the case?

5. Did the Courts Below so far depart, and sanction such departure in this case, from the accepted and usual course of judicial proceedings?

STATUTES INVOLVED

Rule 43(a) of the Federal Rules of Civil Procedure and Kansas Statutes K. S. A. 60-243, 60-407, and 60-420 respectively, provide as follows:

> "All evidence shall be admitted which is admissible under the Statutes of the United States, or under the rules of evidence heretofore applied in the Courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."
>
> Rule 43(a) of the Federal Rules of Civil Procedure.

"EVIDENCE.

"(a) FORM AND ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by this Article. All evidence shall be admitted which is admissible under the specific statutes or articles for this chapter. The competency of witnesses to testify shall be determined in like manner."

K. S. A. 60-243.

"GENERAL ABOLITION OF DISQUALIFICATIONS AND PRIVILEGES OF WITNESSES, AND OF EXCLUSIONARY RULES.

"Except as provided by Statute (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is qualified to testify to any matter, and (d) no person has the privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible."

K. S. A. 60-407.

"EVIDENCE GENERALLY AFFECTING CREDIBILITY.

"Subject to Section 60-421 and 60-422, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility."

K. S. A. 60-420.

STATEMENT

Petitioner corporation (Plaintiff and Appellant in the Courts Below) initially brought this action against the respondent insurance company (Defendant and Appellee in the Courts Below) in the District Court of Sedgwick County, State of Kansas. On respondent's petition for removal, on grounds of diversity of citizenship, the case was remanded to the Federal District Court for the District of Kansas.

On April 19, 1962, an aircraft belonging to the Petitioner was completely destroyed by fire. Petitioner brought this action to recover $100,000.00 on the fire insurance policy issued by the respondent insurance company insuring said aircraft.

Trial of the lawsuit commenced on January 25, 1965, before the Honorable Wesley E. Brown and was concluded by a jury verdict and judgment thereon in favor of the respondent on the evening of February 2, 1965. Respondent asserted two defenses to Petitioner's claim, fraud in the inducement and arson, arising out of alleged acts of petitioner's president, Rudolph R. Greenbaum, in procuring the aircraft's destruction for purposes of collecting the said insurance.

The jury found in answer to special interrogatories (1) "Did the plaintiff corporation, through its president, fraudulently over-state the value of the aircraft involved and thereby induce defendant to issue the policy in question?", (2) "Was the aircraft in question intentionally and deliberately destroyed?", and (3) "Did the plaintiff corporation, through its president, arrange for and procure the deliberate destruction of its aircraft for the purpose of collecting the insurance on the aircraft?", that petitioner

was not guilty of fraud, but did, through its president, procure said aircraft's intentional destruction.

The plane involved was a Lockheed Lodestar which was manufactured for the military during World War II. In February, 1962, petitioner bought the plane for the sum of $13,500.00, including valuable spare parts. The initial asking price for the aircraft was $49,000.00 but the Seller had no success in selling it at that figure.

Prior to the bringing of the aircraft to Wichita, Mr. Greenbaum called one James Hill to acquire insurance on the plane. Mr. Hill was an insurance agent in Wichita who placed his airplane insurance with respondent insurance company. Petitioner owned another Lockheed Lodestar and the insurance on it was also carried with the respondent. The other Lodestar aircraft cost $37,000.00 and was insured for $125,000.00 with the knowledge of Mr. Hill.

When Mr. Greenbaum called Mr. Hill about the insurance on the new plane either Mr. Hill or Mr. Greenbaum suggested that the amount be $100,000.00. There was no discussion of the purchase price. The respondent company issued the policy in that amount. The respondent had previously insured the same aircraft for Manufacturer's Hanover Trust Company of New York, its prior owner, in the amount of $99,300.00. Said policy was known as a Stated Amount Policy having no relation to the purchase price. The reason for insuring the aircraft for an amount in excess of its purchase price is that the aircraft has long been out of manufacture and if, for instance, a wing or part is destroyed, said destroyed part has to be custom made at a tremendous expense.

There is no dispute that the plane was

completely destroyed by fire. There was a dispute in the trial court on the cause of the fire. The respondent contends that the fire was deliberately set and that petitioner's president hired it to be done. Petitioner contends that the fire was accidental, and, that even if it were not, petitioner was not connected with the burning.

Petitioner contended that it was a gasoline explosion in the aircraft itself. A professor of chemical engineering for the University of Kansas testified as an expert to this effect. Respondent's theory is that it was an intentional dynamite explosion and respondent produced experts who testified that the plane's destruction was so caused.

Respondent produced direct evidence as to the cause of the explosion. One Rex Conn testified that he personally placed and lighted the dynamite charge. The testimony of the witness Conn, as the Opinion of the Appellate Court Below states, "... is essential to the insurer's case."

Rex Conn testified in substance that one George Poulos propositioned him to burn the aircraft and promised him the sum of $1,500.00 if the aircraft was completely destroyed. Conn further testified that Poulos told Conn that Poulos was hired to destroy the plane and told Conn who hired Poulos to burn it. Prior to the trial, during the trial and after the trial, your Petitioner objected to the testimony of Rex Conn on the ground that Conn was paid $1,000.00 to testify by the respondent and on the ground of hearsay. The respondent had, for many months after the fire, been trying to develop evidence that there was arson. Rex Conn had been questioned by various people and had denied any connection with the burning of the plane. In

February, 1963, almost a year after the fire, Rex Conn was visited at the Kansas penitentiary by Mr. Rundle, trial counsel for the respondent below, and George Robinson, an investigator for the respondent. Rex Conn was then serving a ten to thirty year habitual criminal sentence arising out of a car theft charge. At that time they offered to pay Conn $1,000.00 if he would testify at the trial. Respondents refer to it as a "reward". There was, however, no public offer of a reward nor was anyone of respondent's ten other witnesses offered a "reward" except Rex Conn. The $1,000.00 was delivered to Rex Conn's mother. It was only after Rex Conn was visited in the penitentiary by Mr. Rundle and Mr. Robinson and offered the $1,000.00 that he admitted being involved in the arson. (He knew of the pending litigation).

In addition, Rex Conn had reason to hope he would receive a reduction in sentence if he testified. He had threatened to "get" George Poulos and was successful. (George Poulos was subsequently convicted of arson for the destruction of the subject aircraft in the District Court of Sedgwick County, State of Kansas. Rex Conn plead guilty to the same offense at said trial. Rex Conn admits that when he plead guilty he was told that the sentence for arson would try to run concurrently with his sentence as an habitual criminal. Subsequently Conn's sentencing for arson was made to run concurrently.)

Because of the payment to Conn to testify and the other above-mentioned matters, petitioner continually moved before the trial, at the trial and after the trial that Rex Conn be precluded from testifying. The effect of his testimony was so prejudicial and damaging to the petitioner's cause that it nullified all evidence of the petitioner and deprived the petitioner of a fair trial consistent with modern concepts of due

process.

Prior to the subject trial, there was considerable newspaper coverage of the case to the effect that the president of the petitioner corporation procured the intentional burning of the subject aircraft. The newspaper coverage was so broad, pervasive and prejudicial that it further deprived the petitioner of a fair trial consistent with modern concepts of due process.

REASONS FOR GRANTING THE WRIT

I.

THE PAYMENT OF EXCESSIVE WITNESS FEES TO A NON-EXPERT WITNESS, AMENABLE TO PROCESS, WHO GIVES HIGHLY PREJUDICIAL TESTIMONY, RESULTS IN A DENIAL OF DUE PROCESS OF LAW.

It is petitioners' contention that the payment to witness Conn of excessive witness fees perverted justice in that it caused witness Conn to give perjured testimony which thereby resulted in a denial of due process of law to the Petitioner.

A. Due Process of Law

The Due Process clause has as its purpose the insuring of the fair and orderly administration of the laws.

International Shoe Company v. Washington, 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154,

Due process has to do with the denial of fundamental fairness, shocking to the universal sense of justice; it deals neither with power nor with jurisdiction, but with their exercise.

Kinsella v. United States, 361 U. S. 234, 4 L. Ed. 2d 268, 80 S. Ct. 297.

Due process, in terms of a judicial hearing, means the proceeding or hearing must be appropriate, fair, adequate, and such as is practical and reasonable in the particular case. The failure to afford an accused a fair hearing violates even the minimal standards of due process.

Irvan v. Dowd, 366 U. S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639.

The due process clause of the 14th Amendment forbids fundamental unfairness in the use of evidence, whether true or false.

Blackburn v. Alabama, 361 U. S. 199, 4 L. Ed. 2d 242, 80 S. Ct. 274.

Petitioner contends, as set forth below, that the use of witness Conn's testimony under the circumstances, was fundamentally unfair and shocking to the universal sense of justice, and therefore, petitioner was denied a fair trial.

B. Witnesses Duty To Testify.

Witnesses owe a duty to the State to aid in the due administration of the government for such compensation as the law provides, and they may be compelled to appear and testify, even though the statute makes no provision for

compensation. It is a general rule that aside from certain well-defined exceptions and qualifications, every competent person may be compelled to bear testimony in the administration of the laws by the duly constituted courts of the country. It is the inherent power of the court of justice, within the sphere of its jurisdiction to compel witnesses to appear before it and testify concerning any relevant facts within their knowledge in a case then pending in court.

58 American Jurisprudence,
subsection 29, page 38.

This court recognized the subject principal in handing down the decisions in United States v. Bryan, 339 U. S. 323, 94 L. Ed. 84, 70 S. Ct. 724, Reh. Den. 339 U. S. 991, 94 L. Ed. 1391, 70 S. Ct. 1081, and Ullman v. United States, 350 U. S. 422, 100 L. Ed. 511, 76 S. Ct. 497, Reh. Den. 351 U. S. 928, 100 L. Ed. 1457, 76 S. Ct. 777.

Petitioner contends that witness Conn had a duty to testify without the payment of excessive fees. He was amenable to process. Respondent's contention that the $1,000. payment was a reward is patently erroneous. There was no public offer of reward, nor was any one of respondent's ten other witnesses offered a "reward". It was only after witness Conn received the $1,000 fee which respondents euphimistically refer to as a reward, that he admitted being involved in the arson. Respondents, in calling the $1,000.00 fee a "reward", would have this court believe that by merely placing a sign with the word "Horse" imprinted thereon, on a cow, will change the cow to a horse.

C. Effects Of The Payment Of Excessive Compensation To A Non-Expert Witness.

There are no cases directly in point holding that the payment to a non-expert witness of excessive witness fees results in a denial of due process in the ensuing trial. There are, however, numerous State cases and one Federal case holding that a contract to pay a witness amenable to process more than regular fees is non-enforceable for want of consideration and void because such a contract offers enticement to perjury, tends to pervert the course of justice, and therefore, is contrary to public policy. The reasoning and significance of such cases is applicable to the case at bar. There is no federal uniform rule with respect to this subject; only two articles in general, speak of the need of uniformity for rules of evidence in the Federal Courts. Please see 24 F. R. D. 331, and 24 F. R. D. 341.

The Restatements of Contracts, subsection 552, holds that a bargain to pay a witness, who is amenable to process, additional or contingent compensation is void for the reason that the witness is already under a legal duty to give his testimony and the witness' promise to appear and testify is therefore not sufficient consideration.

More importantly, the cases hold that such a contract invites perjury and tends to pervert the course of justice.

Alexander v. Watson, 128 F. 2d 627.

In Right v. Somers, 125 Ill. App. 256, a case dealing with a contract to pay a fact witness for his loss of time the court said on p. 257,

"If a witness, who knows a fact material to the issue in the cause, either before or after the service of a subpoena upon him, can traffic with the suitor, who desires to call him, as to the value of his testimony, and then call upon the courts to enforce the contract, thus made, the tendency to evil consequence is apparent. Such a ruling leans toward the procurement of perjury; towards the raising up of a class of witnesses who, for a sufficient consideration, will give testimony that shall win or lose the lawsuit, towards the perversion of justice; and towards the corruption in our Courts."

The leading case in this area is State ex rel Spillman v. First Bank of Dickerson, 114 Neb. 423, 207 N. W. 674 and 45 A. L. R. 1418. In the Spillman case, certain fact witnesses, amenable to process sought to enforce the payment to them of $1,700. as witness fees. The original case involved the witnesses' testimony in defense of a doctor accused of murder as a result of performing an abortion. The court in discussing the contract to pay such witnesses' fees stated on page 429:

"That the amount for that purpose was to be liberal is evidenced by the placing before them at all times and under their control the $1,700.00. This agreement was not one wherein the witnesses possessed any particular skill or ability or who were to so inform themselves . . . These claimants told the women [the witnesses] what they wanted the evidence for, and the women told them what

they knew. The temptation to induce lack of disclosure of all they knew, or to color or add to what they knew, was too alluring to be held to be in furtherance of justice. Its tendency is to work a denial of due process of law. It is not necessary for us to find that the intent of the contract was to procure perjury, but that the contract had the tendency and opened a strong temptation to the procurement of perjury. The tendency of such arrangements is to pervert justice, to bring courts into disrepute, and to cause a lack of confidence therein." (Emphasis added)

To the same effect, please see Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L. R. A. 348; Clifford v. Hughes, 139 App. Div. 730, 124 N. Y. S. 478; In re Ramschasel's Estate, 24 Pa. Super. 262; Dodge v. Stiles, 26 Conn. 463; and note 30 L. R. A. N. S. 278 N. 280.

The Spillman case sets forth succinctly the contentions of petitioner. The payment of an excessive witness fee to the witness Conn caused him to perjure himself. The perjured testimony he gave was so prejudicial to petitioner's cause that its effect was to nullify all of petitioner's evidence and deny it a hearing consistent with modern concepts of due process of law. Further, the witness Conn having once testified, the Trial Court seriously erred in not allowing the proffered instruction that the fact that said witness was paid excessive compensation may be considered in determining the weight and credit to be given to his testimony. For the above reasons, petitioner did not receive a fair trial consistent with modern concepts of due process.

II

THE MASSIVE AND PREJUDICIAL PRE-TRIAL PUBLICITY ATTENDING PETITIONER'S CASE PREVENTED HIM FROM RECEIVING A FAIR TRIAL CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Prior to the time of trial, the Wichita newspapers printed damaging and prejudicial accounts of the alleged arson in this case. The parties, witnesses, and their alleged acts were clearly described and identified.

The total and complete coverage given the case in the newspapers in Wichita, Kansas, not a large city, was a further example of petitioner's being denied a fair trial consistent with the due process clause of the Fourteenth Amendment.

The most recent case decided by this court involving newspaper publicity and a fair trial, was Sheppard v. Maxwell, Warden. Unofficially reported in Official Reports of the Supreme Court, Vol. 384, U. S. - Part 2, page 333. Although the case involved a criminal prosecution, the theory of the Sheppard case is applicable to the case at bar. The Sheppard case held that the massive, pervasive and prejudicial publicity attending the petitioner's prosecution prevented him from receiving a fair trial consistent with the due process clause of the Fourteenth Amendment. The case was remanded to the District Court with instructions to release the petitioner from custody unless he was tried again within a reasonable time. (A re-trial ended in a verdict of Acquittal for the petitioner.)

Your petitioner contends that the rule of the Sheppard case is applicable to the case at bar, and under said reasoning the petitioner was denied a fair trial consistent with modern concepts of due process.

CONCLUSION

The decisions below are palpably erroneous thereby preventing the petitioner from receiving a fair trial consistent with the Due Process Clause of the Fourteenth Amendment. The decisions of the courts below in the instant case raise new and undecided questions of general importance in the administration of justice which should be reviewed by this Court. The Courts below, in allowing the conduct and evidence as aforesaid departed from the usual and accepted course of judicial proceedings. For these reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 8297 - JULY TERM, 1966

JAMAICA TIME PETROLEUM, INC.,	)	Appeal from the
Appellant,	)	United States District Court
v.	)	for the
FEDERAL INSURANCE COMPANY,	)	District of Kansas
Appellee.	)	

Fred M. Winner (Winner, Berge, Martin and Camfield and Brick, Beaty and Bonwell were with him on the brief) for Appellant.

William A. Rundle, Jr., and Byron Brainerd (Morrison, Hecker, Cozad & Morrison and Weigand, Curfman, Brainerd, Harris & Kaufman were with them on the brief) for Appellee.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Appellant-plaintiff Jamaica Time Petroleum, Inc., (insured) brought suit to recover $100,000 on an insurance policy written by appellee-defendant Federal Insurance Company (insurer) on an airplane which was destroyed by an explosion and fire. Jurisdiction is based on diversity. The case was tried to a jury which returned a verdict for the insurer and in answering specific interrogatories found that the airplane was intentionally and deliberately destroyed and that such destruction was procured by the president of the insured for the purpose of collecting the insurance.

Insured, a Kansas corporation, was organized to exploit a concession in Jamaica. Ninety percent of its stock is owned by its president, Greenbaum, and his wife. It owned a Lockheed Lodestar airplane. 1/ In February 1962, insured bought from a New Jersey airplane broker a similar Lockheed Lodestar plane together with a supply of spare parts. The total cost for this "package" was $13,500. Greenbaum obtained from the insurer a policy on the plane in the amount of $100,000. About March

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1/ The Lockheed Lodestar is an obsolete aircraft which was manufactured in the early 1940's and for which it is difficult to obtain spare parts.

10, 1962, a pilot for the insured flew the plane to Wichita, Kansas, and parked it in the general tie-down area of the Wichita Municipal Airport near the terminal building. The plane was next flown on April 10 and the insured's pilot then left it in a remote area of the airport. Greenbaum was advised of the plane's location. On the following night an explosion occurred and the plane was destroyed.

The parties agree that the insurer has the burden of establishing the defense of arson by either direct or circumstantial evidence, 2/ and that the insurer must prove deliberate destruction for which the insured was responsible. The insured concedes that the evidence of deliberate destruction is sufficient but attacks the adequacy of the proof to show the responsibility of the insured for that destruction. We must first consider the admissibility of certain evidence.

The testimony of the witness Conn is essential to the insurer's case. When he appeared as a witness at the trial, Conn, a man with a long criminal record, was serving a 30-year term in the Kansas penitentiary under a habitual criminal charge. He was approached in the penitentiary by an attorney and an investigator for the insurer who offered him a "reward" of $1,000 "for information leading to the solution of the destruction" of the airplane. Thereafter he talked to the insurance company representatives and $1,000 was paid to his mother. Subsequently, he repeated his statements to Kansas police officers.

2/ Baltimore American Ins. Co. v. Pecos Mercantile Co., 10 Cir., 122 F. 2d 143, 147.

Conn testified that one Poulos hired him and two others to destroy the airplane, that Poulos agreed to pay him $1,500 for the job but did not do so, and that the destruction was accomplished by igniting under the airplane explosives contained in a satchel supplied by Poulos. 3/ Over the objection of the insured, Conn testified that Poulos told him that he, Poulos, was hired to have the airplane destroyed. 4/

The insured says that Conn was not a competent witness. His adjudication as a habitual criminal did not disqualify him. 5/ Conn's hope to secure a reduction in sentence and his expressed animosity to Poulos affect only his credibility - not his competence. The remaining ground for attack is the payment of the $1,000 "reward."

3/ Poulos was tried in state court for conspiracy to commit arson by setting fire to the Lodestar plane, was found guilty, and on appeal the conviction was affirmed. See State v. Poulos, 196 Kan. 253, 411 P. 2d 694.

4/ An offer by the insurer to adduce testimony from Conn that Poulos told Conn that Greenbaum hired him, Poulos, to destroy the airplane and to pay him $25,000 for such action was rejected by the district court.

5/ See Rosen v. United States, 245 U. S. 467, 471. Rule 43(a), F. R. Civ. P., makes the federal rule of competency applicable.

The rule that a nonexpert cannot enforce a promise to pay compensation for his testimony [6] because of the invitation to perjury which would contravene public policy is not pertinent here. We are not concerned with any dispute over failure to pay. Conn's mother received the $1,000.

The offer and payment of the reward were not contingent either on the testimony of Conn in court or on the outcome of any litigation. The information given by Conn related to a past event. This is a civil case. We are not concerned with decisions which deal with contingent fee agreements to produce evidence against particular persons for crimes not yet committed. [7] Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, is not in point. That was an equity suit for patent infringement in which the plaintiff suppressed evidence of a prior use and the Court held that because of such suppression the plaintiff violated the clean hands doctrine. Here, the evidence was presented - not suppressed.

The payment of the reward affects the credibility of the witness and the weight to be given his testimony. These factors are not

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6/ See Alexander v. Watson, 4 Cir., 128 F. 2d 627, 630.

7/ See Williamson v. United States, 5 Cir., 311 F. 2d 441, 444. Cf. Hill v. United States, 5 Cir., 328 F. 2d 988, cert. denied 379 U.S. 851, and United States v. Crim, 4 Cir., 340 F. 2d 989.

determinative of competence to testify. 8/ When the insurer offered and paid the reward it took a calculated risk of securing usable and believable information. The question of the credibility of Conn was for the jury and was submitted to them under instructions which are not here attacked and which we find adequate.

The insured says that Conn's testimony that Poulos told him that he, Poulos, was hired to destroy the airplane was inadmissible hearsay. Rule 43(a), F. R. Civ. P., permits the admission of evidence under the rules of the state in which a trial in a United States court is held. The trial court received the testimony under a 1964 Kansas statute 9/ which excepts from the hearsay rule "a statement which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability * * * that a reasonable man in his position would not have made the statement unless he believed it to be true." The statement attributed to the declarant Poulos comes within this provision because it exposed him to both civil and criminal liability. The Kansas Supreme Court has not construed the pertinent provision of the 1964 statute. In such circumstances we accept the decision of the trial court unless clearly convinced to the

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8/ See Brown v. United States, 9 Cir., 222 F.2d 293, 297.

9/ K. S. A. 60-460(j)

contrary. 10/ Here we are convinced that the district court correctly construed and applied the statute.

Speculation and conjecture are not enough to sustain a defense of arson. The insurer must establish by a fair preponderance of the evidence the incendiary origin and the responsibility of the insured therefor. 11/ In considering the insured's claim that it was entitled to a directed verdict, we must view the evidence and the reasonable inferences therefrom in the light most favorable to the opposing party. 12/

At the time of the purchase and destruction of the airplane the insured was in an unhealthy financial position. Its book value net worth was only $5,000 and it owed its president Greenbaum and his wife over $150,000. The insured had no use for the airplane except as a source of parts for its other plane. No effort was made for the substitution of parts and the additional parts secured from the New Jersey broker were not destroyed. Such additional parts were valued at one-half of the $13,500 paid by the insured. The $100,000

10/ Dallison v. Sears, Roebuck and Co., 10 Cir., 313 F. 2d 343, 347. See also Solomon v. Downtowner of Tulsa, Inc., 10 Cir. 357 F. 2d 449, 451.

11/ Baltimore American Ins. Co. v. Pecos Mercantile Co., 10 Cir., 122 F. 2d 143, 148.

12/ Commercial Standard Insurance Company v. Feaster, 10 Cir., 259 F. 2d 210, 212.

insurance on the plane was greatly in excess of its worth. 13/ Before the destruction, the insured tried unsuccessfully to sell the plane at a substantial profit. Although the insured presented two experts who testified that the explosion was of gasoline origin it did not offer any explanation of how the explosion occurred. The same two witnesses testified in the state criminal trial of Poulos and were paid by the insured for that court appearance.

The testimony and conduct of insured's president Greenbaum defies explanation. The insurer presented evidence that Greenbaum was seen with Poulos both before and after the explosion. Greenbaum's testimony in regard to such meetings was, at the least, evasive. Greenbaum knew of the removal of the airplane from a frequently used to a remote section of the airport. When informed of the explosion, he responded only by inquiring whether anyone was hurt. The statement of Poulos that he was hired to destroy the airplane was before the jury. Greenbaum did not deny participation or complicity in such destruction.

The record shows deliberate destruction.

13/ In this regard we recognize that the jury found in favor of the insured in answering the interrogatory relating to fraudulent overstatement of value. The evidence showed that the prior owner of the plane had it insured for $99,300 and that the other Lodestar owned by insured was insured for $125,000. The policy was a "stated amount" type particularly applicable to property in which partial loss would require extensive custom-made parts for restoration.

A motive for incendiarism is established. A connection, perhaps tenuous but none the less present, is shown between the arsonists and the president of the insured. The evidence and the reasonable inferences therefrom are sufficient to sustain the denial of the insured's motion for a directed verdict and to support the verdict of the jury. 14/

Affirmed.

14/ See British American Assur. Co. v. Bowen, 10 Cir., 134 F. 2d 256, in which a defense of arson based on circumstantial evidence was upheld.

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APPENDIX B-1

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Wesley E. Brown, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant Federal Insurance Company recover of the plaintiff Jamaica Time Petroleum, Inc. their costs of action.

Dated at Wichita, Kansas, this 2nd day of February, 1965.

(Seal)

D. M. Quillen
Deputy Clerk of Court

Filed February 2, 1965

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APPENDIX B-2

JUDGMENT

Thirty-Seventh Day, July Term, Wednesday, September 7th, 1966.

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable John J. Hickey, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said district court in this cause be and the same is hereby affirmed.

[On October 13, 1966, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Kansas.]